

W00A

FILED

SID J. WHITE

MAY 7 1993

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF FLORIDA

JEFFREY L. STICKNEY, M.D., JAMES N.
PAPPAS, M.D., DOUGLAS STRINGHAM,
M.D., TOM D. HOWEY, M.D., PAUL T.
FORTIN, M.D., MARK FRANKLE, M.D.,
and WILLIAM F. BENNETT, M.D.,

Petitioners/Appellants,

v.

THE BOARD OF REGENTS OF THE STATE
OF FLORIDA STATE UNIVERSITY
SYSTEM,

Respondent/Appellee.

Fla. Sup. Ct. Case No. 80,623

1st DCA Appeal No. 92-3059

REPLY BRIEF OF PETITIONERS/APPELLANTS
ON THE MERITS

SAMUEL R. MANDELBAUM, ESQUIRE
Smith, Williams & Bowles, P.A.
Post Office Box 897
Tampa, Florida 33601-0897
(813) 253-5400
Florida Bar No. 270806
Attorneys for Petitioners/Appellants

TABLE OF CONTENTS

	<u>Page No.</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF CASE AND FACTS	1
ARGUMENT IN REPLY.....	2
THE FIRST DISTRICT'S DECISION DISMISSING THE APPEAL BELOW FOR FAILING TO FILE THE OTHERWISE TIMELY NOTICE OF APPEAL IN THE "PROPER COURT" IS ERRONEOUS, SINCE A DISTRICT COURT OF APPEAL HAS JURISDICTION TO ENTERTAIN AN APPEAL FROM A FINAL JUDGMENT OF A CIRCUIT COURT WHERE, AS HERE, (1) THE APPELLANT ERRONEOUSLY FILES A NOTICE OF APPEAL WITH THE DISTRICT COURT RATHER THAN THE CIRCUIT COURT, AND (2) THE APPELLANT IS UNABLE TO TAKE CORRECTIVE ACTION TO FILE THE NOTICE OF APPEAL IN THE CIRCUIT COURT WITHIN THIRTY DAYS OF THE RENDITION OF THE FINAL JUDGMENT.....	2
CONCLUSION.....	5
CERTIFICATE OF SERVICE	5

TABLE OF AUTHORITIES

	<u>Page No.</u>
<i>Alfonso v. DER,</i> 18 FLW S194 (Op. Filed 4/1/93).....	2, 4, 5
<i>Hines</i>	5
<i>Johnson</i>	5
<i>Lampkin-Asam v. DCA,</i> 364 So.2d 469 (Fla. 1978)	2
<i>Restrepo v. First Union,</i> 18 FLW S208 (Op. Filed 4/1/93).....	2, 5
<i>Sanchez</i>	5
<i>Skinner</i>	5
<i>Sternfield</i>	5

STATEMENT OF CASE AND FACTS

The Petitioners shall rely on their Statement of Case and Facts appearing in their main merit brief. However, the Petitioners take strong exception to some statements and argument made by Appellee's counsel in his brief, to which a reply shall be made.

In his Appellee's brief, counsel for Appellee/Respondent suggests, for the first time throughout these proceedings, that the Notice of Appeal was not stamped as "received" by the First DCA on June 22, 1992. Rather, Appellee's counsel now *argues* that there was "an illegible date stamp" of the First DCA on the original Notice of Appeal, and that the date stamp showing receipt in his own office (the Attorney General's Office) was June 24, 1992. Needless to say, it is highly inappropriate for Appellee's counsel to inject an extraneous and irrelevant matter into this appeal by personally "testifying" concerning the receipt stamp of the Attorney General's office. As factually determined by Leon County Circuit Court Judge P. Kevin Davey on September 8, 1992, "the First District Court of Appeal *filed the Notice of Appeal on June 22, 1992, and affixed the 'filed stamp' as of that date (i.e., June 22, 1992)*" (A 27). The afore-described circuit court order and finding are verily contained in the record on appeal prepared by the First DCA at R 17-18.

Significantly, the Appellee never noted an objection to Judge Davey's foregoing finding that the original notice was filed on June 22, 1992, nor has such finding ever before been disputed, contested or challenged in any way as erroneous by Appellee's counsel, the First DCA, or any other party.

ARGUMENT IN REPLY

THE FIRST DISTRICT'S DECISION DISMISSING THE APPEAL BELOW FOR FAILING TO FILE THE OTHERWISE TIMELY NOTICE OF APPEAL IN THE "PROPER COURT" IS ERRONEOUS, SINCE A DISTRICT COURT OF APPEAL HAS JURISDICTION TO ENTERTAIN AN APPEAL FROM A FINAL JUDGMENT OF A CIRCUIT COURT WHERE, AS HERE, (1) THE APPELLANT ERRONEOUSLY FILES A NOTICE OF APPEAL WITH THE DISTRICT COURT RATHER THAN THE CIRCUIT COURT, AND (2) THE APPELLANT IS UNABLE TO TAKE CORRECTIVE ACTION TO FILE THE NOTICE OF APPEAL IN THE CIRCUIT COURT WITHIN THIRTY DAYS OF THE RENDITION OF THE FINAL JUDGMENT.

In this Court's recent decision in *Alfonso v. DER*, 18 FLW S194 (Op. Filed 4/1/93), this Court held that an otherwise timely notice of appeal filed in the appellate court within the 30-day jurisdictional time period is *not* jurisdictionally barred. Accordingly, this Court noted that it was *receding* from its 1978 decision in *Lampkin-Asam v. DCA*, 364 So.2d 469 (Fla. 1978), and held that a notice of appeal "wrongly filed should be transferred to the appropriate court with the date of filing being the date the document was filed in the wrong court." See also: *Restrepo v. First Union*, 18 FLW S208 (Op. Filed 4/1/93). As *Alfonso* is dispositive of the issue in this case, this Court should quash the First DCA's dismissal order and reinstate the appeal.

In its second motion for extension of time to serve answer brief served about a month ago on April 2, 1993, the Appellee verily admitted that this Court's recent *Alfonso* decision would be "controlling" in this appeal and that Appellee's filing of an Appellee's brief would be "unnecessary" if there is no rehearing . . .

"It appears that the Court's decision in *Alfonso v. DER* is controlling of the issues in the instant appeal. * * * In the event no motion for rehearing is filed or, if filed, is determined adversely to the movant, it would appear unnecessary for Respondent, the Board of Regents of the State University System, to file an answer brief in the instant appeal."

However, the Appellee now changes its position to the contrary, 3 weeks later on April 26, 1993 in its Answer Brief, and essentially creates previously-resolved "factual issues" for the first time throughout these proceedings by suddenly disputing that the original notice of appeal was ever filed in the First DCA on June 22, 1993.

After a hearing on this issue in the trial court, Leon County Circuit Judge D. Kevin Davey expressly held that on June 19, 1992 Petitioners' counsel had inadvertently and through clerical error mailed the Notice of Appeal and filing fee check to the First DCA (R 17; A 27). As Judge Davey found:

"1. On June 19, 1992, Smith & Williams, P.A., as counsel for Plaintiffs, mailed a Notice of Appeal for filing in the First District Court of Appeal, along with the appropriate filing fee of \$250.00.

2. Through clerical error, the Notice of Appeal and check were inadvertently mailed for filing to the First District Court of Appeal.

3. Notwithstanding, the First District Court of Appeal *filed the Notice of Appeal on June 22, 1992, and affixed the "filed stamp" as of that date (i.e., June 22, 1992).*" (R 17; A 27)

Thus, it was the circuit court's *express* finding of fact that the original Notice of Appeal was verily filed in the First DCA on June 22, 1992, which bore the "filed stamp" as of that date (R 17; A 27).

The record is devoid of any prior objection, suggestion or error or exception made by Appellee or its counsel at any time Judge Davey's finding as erroneous. Appellee's counsel never before challenged or appealed the Circuit Court's finding in this regard. In its Appellee's Reply to Appellants' Response to Order to Show Cause *filed in the First DCA*, Appellee never disputed the fact that the original notice was filed on June 22, 1992 (R 28-32; A 39-43). Similarly, in the Respondent's jurisdictional brief filed in this Court, the Appellee similarly never disputed Judge Davey's finding of the initial filing date of the notice on 6/22/92. And Appellee's statement a month ago in its April 2, 1993 second motion for extension, advising

this Court that *Alfonso* was "controlling" on this appeal and that the filing of an Appellee's merit brief would be "unnecessary" absent rehearing of *Alfonso*, is wholly repugnant to the new and changed position asserted by Appellee in its merit brief.

Having previously failed to contest, challenge or appeal Judge Davey's findings of the 6/22/92 file date, the Appellee is precluded from now creating this factual issue for the first time at the final stage of the appellate process. Accordingly, the Appellee has waived this issue for appellate review, and this Court should accept the trial court's factual determinations that the original Notice of Appeal was timely filed and stamped in the First DCA on June 22, 1992 (R 17; A 27).

The First DCA erred in dismissing Petitioners' otherwise timely notice of appeal for filing in the wrong place. Accordingly, the First District's order dismissing the subject appeal should be quashed, with instructions to determine the merits of the appeal therein. *Alfonso; Restrepo*.

CONCLUSION

Even though the notice was timely filed in the wrong court, such filing with the Clerk of the First District was sufficient to invoke the First District's appellate jurisdiction. See *Alfonso, Restrepo, Skinner; Johnson; Sanchez; Sternfield; Hines*. Based upon the foregoing arguments and authorities, the Petitioners respectfully request this Honorable Court to quash the order of the First District dismissing the appeal, and remand with instructions for the First District to reinstate the Petitioners' appeal thereto.

Respectfully submitted,

SMITH, WILLIAMS & BOWLES, P.A.
Post Office Box 897
Tampa, Florida 33601-0897
(813) 253-5400
Attorneys for Petitioners/Appellants

By: Sam Mandelbaum
Samuel R. Mandelbaum, Esquire
Florida Bar No. 270806

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been furnished by U.S. Mail to Morris E. Shelkofsky, Jr., Assistant Attorney General, Department of Legal Affairs, The Capitol, Suite 1501, Tallahassee, Florida 32399-1050, and to Debra A. King, Senior Counsel, University of South Florida, ADM 250, 4202 East Fowler Avenue, Tampa, Florida 33620-6250, this 5 day of May, 1993.

Sam Mandelbaum
Samuel R. Mandelbaum, Esquire